86-706

Case No:_____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

EARL AGATE, et al.,*

Petitioners,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,

Respondent.

On Writ of Certiorari to
the United States Court of
Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES B. FORD (P26997)
ZARBOCK & FORD
Attorneys for Petitioners
119 North Church Street
Suite 202
Kalamazoo, Michigan 49007
(616) 342-0288

QUESTION PRESENTED

Whether Section 301 of The Labor Management Relations Act of 1947 permits individual employees to seek judicial review of an employer's breach of an oral contract to use seniority when issuing permanent layoffs if the National Collective bargaining agreement does not include the oral contract or provide for final resolution of oral contract disputes in the grievance procedure.

*Listing of All Petitioners

Earl Agate, Roger Barnos, Jerry E. Blake, A.L. Brird, Charles G. Brown, Jerry A. Brooks, Robert Capps, M. Cardossa, Kenneth L. Carpenter, Frank Casanto, David Clapp, Daniel Craig Cole, Charles Cummings, M.R. Czuk, Erby T. Daughtry, Frank C. David, Roger Demond, Richard E. Donovan, Don Eastman, John P. Ebbitt, Ron Eldred, Jerry Everett, John G. Flora, Laimonis V. Friede, Francis W. Fuseek, Mel Gauthier, Edward L. Gossett, Richard A. Granger, James H. Greffith, Gordon F. Haas, Robert E. Hambright, Robert W. Harrington, John Hatfield, Roland Haywood, Frank Hiestand, Jr., Louie R. Hill, John Hippensteel, Clifford B. Holliday, Albert E. Hunter, Charles W. Ivy, Alan W. Johnson, Alwyn V. Johnson, Thomas J. Kelley, Wm. E. Lane, Wendall R. Lawrence, David C. Linder, Robert R. Little, Henry L. Lough, Frederick E. Lull, James Mallow, Jack Marion, Dave McClelland, Oliver L. McDonald, Gerald McNett, Ronald D. McSpadden, Gail Mick, David B. Middleton, Clyde M. Millard, Rex Millard, Mason Miller, George P. Moore, Thomas Moore, Larry T. Nystrom, Wayne R. Oakes, Lynn E. Pervine, James Powell, Harold D. Powers, Ray D. Rose, Jan Schnooberger, Jim Shepard, Dave Snell, Virgil D. Stevens, Paul E. Swafford, Marlow Terry, Carl L. Thompson, Vernon Thompson, James W. Troxell, Thomas E. Tucker, Billy E. Tyria, Gary L. Uptgraft, George Walker, Donald Williams, Curtis Hawkins, Felton Key, Fred Johnson, Alan L. Randolph, Keith Rosson, James W. Smyers, Neville E. Fergeson, Marshall R. Wallace, and Clarence M. Dunifin

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STATEMENT OF JURISDICTION

Petitioners seek Writ of Certiorari from the decision of the United States Court of Appeals for the Sixth Circuit entered on July 15, 1986, holding that the absence of an arbitration provision did not entitle them to seek judicial review in the District Court of GM's breach of an oral contract.

Jurisdiction is based upon Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185; and 28 U.S.C. Section 1441, 28 USC Section 1291, and Rule 17 of the Rules of this Court.

STATEMENT OF THE CASE

On July 18, 1986, the Sixth Circuit Court of Appeals, in an unpublished Per Curiam Opinion, affirmed the decision of the District Court for the Western District of Michigan which denied Petitioners the right to seek judicial review of their employer's breach of an oral contract to use seniority when reducing its work force. (Appendix p. A-1) Petitioners were employees in training (EITs) at the General Motors Fisher Body Plant in Kalamazoo, Michigan (GM).

The collective bargaining agent, United Automobile Workers of America (UAW) and GM had entered into a written contract entitled, "Agreement between General Motors Corporation

and the UAW, November 11, 1970, effective November 25, 1970" (National Agreement), which covered various items and provided for a four step grievance procedure if the terms of the National Agreement were breached. (Appendix A-43) The oral contract which required GM to consider seniority when laying off EITs was entered into by the parties after the National Agreement was signed.

Layoffs affecting EITs had not been addressed in a written National Agreement until 1979. However, the National Agreement provided in Paragraph 67:

> Employees will be laid off and rehired in accordance with local seniority agreements.

GM and the UAW also agreed in

their memorandum of the 1970 UAW Contract Settlement Agreement, Section 7:

> It is agreed that any written local agreements, including, but not limited to, local wage agreements, local seniority agreements and local shift preference agreements, entered into by the Shop Committees and Local Managements after July 15, 1970, shall become effective as local agreements between the respective local Management and Shop Committee subject to the provisions of the new Agreement, for the life of the new Agreement. Any local agreement without a termination clause shall terminate, without further action by either party to such local agreement, with the effective termination of the new Agreement, and such local agreement shall not be terminated otherwise except as the parties to such local agreement may agree hereafter in writing.

Although GM almost universally adhered to the oral contract and

considered the seniority of EITs in reducing its work force throughout the county from 1970 through 1978, approximately ninety five (95) EITs at the Kalamazoo plant were not laid off according to their seniority. When these ninety five (95) EITs discovered that seniority should have been considered in issuing layoffs, they filed a grievance with the bargaining agent, UAW.

The UAW treated the grievances as a group grievance and initiated proceedings according to the grievance procedures to resolve disputes delineated in the National Written Agreement. GM simply denied the existence of a contract and refused to negotiate the contract dispute. The UAW, which has admitted the existence of the oral contract,

dismissed the grievance prior to arbitration because the National Agreement only provided for final arbitration when written contract disputes were involved.

Paragraph 46 of the National Agreement of 1970 provided:

> It shall be the function of the Umpire, after due investigation and within a reasonable period of time after submission of the case to him, to make a decision in all claims of discrimination for Union activity or membership and in all cases of alleged violation of the terms of the following sections of this Agreement, and written local or national supplementary agreements on these same subjects: Recognition; Representation; Grievance Procedure; Seniority; Disciplinary Layoffs and Discharges; Call In Pay; Working Hours; Leaves of Absence; Union Bulletin Boards; Establishment of New Plants; Strikes, Stoppages and Lockouts; Wages, except Paragraph (97); General Provisions; Apprentices; Skilled Trades; Vacation Pay Allowances; Holiday Pay; Paragraphs (79) through (79f); relative to

to procedures on Production Standards; Paragraph (79h); and of any alleged violations of written local or national wage agreements. The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto; nor to establish or change any wage; nor to rule on any dispute arising under Paragraphs (78) through (78d), (79g) or (79i) regarding Production Standards. The Umpire shall have no power to rule on any issue or dispute arising under the Waiver Section or the Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan Section, except with respect only to the question of whether a discharged employee should receive a supplemental allowance pursuant to Section 8 of Article II of the Pension Plan (Exhibit A-1). Any case appealed to the Umpire on which he has no power to rule shall be referred back to the parties without decision.

(emphasis supplied)

The National Agreement also included a waiver in Paragraph 225, relieving the parties from the obligation to bargain collectively

upon any matter not included in the National Agreement:

> Each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

After the UAW dismissed Petitioner's grievance at the third stage of the grievance procedure on the basis that the Umpire had no authority to issue a decision, Plaintiffs filed suit in the state Circuit Court in Kalamazoo, Michigan, alleging that the UAW breached its duty of fair representation and that

GM breached its oral contract under Section 301 of The National Labor Relations Act of 1947, 29 U.S.C. 185 et seq. (Appendix A-73) Both GM and the UAW sought removal to the District Court for the Western District of Michigan pursuant to 28 USC Section 1441.

On June 18, 1985, the District Court granted Summary Judgment to the UAW holding that the UAW did not breach its duty of fair representation. (Appendix A-5) It also held that the EITs could not proceed with their contract against GM action, absent the union's violation of its duty. The EITs asked the District Court to reconsider its ruling and to allow the EITs to proceed against GM on the contract issue on the grounds that Smith v.

Evening News Association, 371 US 195, 83 S.Ct. 267, 9 LEd2d 246, (1962) authorizes judicial review if the collective bargaining agreement does not provide for arbitration or final resolution of an employee's grievance.

The EITs alleged that the oral contact was supplementary to the National Agreement and that it was not covered by the National Agreements grievance procedure. They argued that when there is no exclusive or binding dispute resolution method agreed upon by the parties, public policy enables the Court to decide breach of contract disputes arising under Section 301 as it would resolve other contract disputes. (Plaintiffs' Brief in Support of Motion to Amend Judgment)

On July 18, 1985, the District Court rendered a decision which held that the grievance procedure specified in the National Agreement was exclusive and final even though there was no provision for arbitration and that, consequently, the EITs had no right to litigate their contract dispute in the District Court. (Appendix A-32)

The EITs appealed the District Court's July 18, 1985, judgment that they had no independent cause of action against GM because the grievance process outlined in the National Agreement was final. The Sixth Circuit Court of Appeals affirmed, Per Curiam, the District Court, stating that the lower Court did not abuse its discretion by denying the EITs the right to proceed

against GM. The Sixth Circuit opinion states that Plaintiff-Appellants moved to amend the pleadings pursuant to Fed. R. Civl. P. 59(e) and did not appeal Judge Gibson's June 18, 1985, opinion which granted summary judgment in favor of defendant in Plaintiffs' Section 301 suit alleging the union's unfair representation. Petitioners did, in fact, ask Judge Gibson to amend his judgment, and appealed the final decision of the District Court pursuant to 28 USC Section 1291, which stated that Petitioners had no right to trial.

The Appellate Court relied upon a previous Sixth Circuit opinion, Fortune v. National Twist Drill & Tool Division, 684 F2d 371 (6th Cir. 1982) which held that an employee is bound by the finality provisions of

an established grievance procedure even when there is no arbitration provision.

Petitioners respectfully submit that the oral contract was reached after the National Agreement was signed and was supplementary to it. The parties, therefore, had no duty to bargain about the layoffs, nor did they have an obligation to process a grievance under the National Agreement when the oral contract was breached. Because there was no duty by GM to resolve the grievance or any right by the EITs to final arbitration, Petitioners contend that the Appellate Court erred in denying them the opportunity for judicial review by the District Court of the merits of their contract dispute.

If the UAW and GM had reached an

agreement to resolve their contract dispute, the EITs would have been bound by that resolution under federal labor policy. The fact that the UAW attempted to utilize an existing dispute resolution mechanism does not mean that the process was either exclusive or that it was final. Rather the circumstances of this case are analogous to those found in Smith v. Evening News Ass'n, supra, in which the Supreme Court upheld the employee's right to litigate his grievance when he had no right to binding arbitration.

Argument

Both Congress and the Courts have sought to promote labor peace and to give full play to the agreed

upon dispute resolution system of the parties since this policy promotes both efficient dispute resolution and serves principles of judicial economy. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 LEd2d 842 (1966). However, exceptions to this public policy have occurred when the bargaining agent has acted in bad faith and in a discriminatory manner, or when it is inept. Milstead v. Teamsters, Local 957, 580 F2d 232 (6th Cir. 1978). Other exceptions have been made when there is no agreed upon final dispute resolution procedure, Bowen v. United States Postal Service, et al, 459 US 212, 103 S.Ct. 588, 74 LEd2 402 (1983).

In Smith v. Evening News Ass'n, 371 U.S. 195, 400-201, 83 S Ct. 267, 270, 271, 9 L. Ed2d 246 (1962) we held for the first time

> that an individual employee may bring a Section 301 suit against an employer for a breach of a collective bargaining agreement. If, as in Smith, the agreement does not contain an arbitration provision, the employee's right to bring suit is unqualified, and in such a case, the employer unquestionably is liable for any and all back pay that is due.
>
> 459 US at 232 103, S.Ct. at 600
> (emphasis supplied)

Section 301(a) 29 U.S.C. Section 185(a) covers any agreement, written or unwritten, formal or informal, that purports to resolve employment disputes between workers and unions. Warrior Contractors, Inc. v. International Union of Operating Engineers, Local Union No. 926, AFL-CIO, 383 F2d 700 (11th Cir. 1967). The Supreme Court in Smith, supra, rejected the narrow

interpretation that Section 301 would preclude individual employees from vindicating their individual rights under the collective bargaining contract.

Although an employee may file suit to vindicate uniquely personal rights such as wages, hours, overtime pay and wrongful discharge, Congress has specified in 29 U.S.C. 173(d) that final adjustment in a manner agreed upon by the parties is the preferred method for resolving grievances. Hines v. Anchor Motor Freight, Inc., 42 US 552, S.Ct. LEd2d (1976). The Supreme Court in Bowen has emphasized, however, "that if the agreement does not contain an arbitration provision, the employee's right to bring suit is unqualified". 459 US at 232.

Petitioners recognize that the Supreme Court has developed a body of law which does not permit an employee to sidestep the grievance machinery set forth in a collective bargaining agreement. Unless he attempts to utilize the contractual procedures for settling his dispute with his employer, an employee's independent suit must be dismissed. However, an employee is entitled to judicial review when the grievance procedure is not exclusive. Republic Steel Corp. v. Maddox, 379 US 650, 85 S.Ct. 614, 13 LEd2d 580 (1965). Petitioners attempted to use an existing grievance procedure but because it was neither final nor exclusive, it failed.

> If a grievance and arbitration procedure is included in the contract, but

> the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted.
>
> Vaca v. Sipes, 386 US 171, 184, n. 9 (1966); 875 S.Ct. 903, 913, n. 9 (1966)

The principles espoused in Republic Steel, 379 US at 657-658 and Bowen, 459 US at 232, are intended to protect the bargaining process. They are not designed to leave an injured employee without a final remedy.

Petitioners assert that the UAW and GM's oral agreement to use seniority in achieving layoffs was a binding agreement. If GM and the UAW would have reduced the oral contract to writing, the Umpire could have interpreted that agreement and arbitrated the dispute under paragraph 46 of the National

Agreement. Instead, when the dispute arose over GM's failure to adhere to its agreement, GM simply denied that a contract existed. The UAW has admitted that the parties reached a binding oral contract in its Answer to the Complaint in this action.

Conclusion

Because the oral agreement at issue was reached after the National Written Agreement of 1970, and was not contemplated by the parties when the grievance procedure was established, Petitioners allege that the UAW and GM did not provide for an exclusive or for a final internal dispute resolution mechanism through the grievence procedure outlined in the National Agreement. Consequently,

Section 301 entitles them to seek redress through the Courts.

Petitioners respectfully contend that the lower Court failed to recognize Petitioners' right to trial under Section 301 pursuant to the rationale articulated by this Court in Smith and Bowen and assert that Petitioner's access to the District Court is unqualified.

WHEREFORE, Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari, that the decision of the Sixth Circuit Court of Appeals be reversed and that this case be remanded to the District Court for Trial on the merits.

DATED: October 13, 1986

Respectfuly submitted,

ZARBOCK & FORD
Attorneys for
Petitioners

BY: /s/
JAMES B. FORD (P26997)
BUSINESS ADDRESS:
119 North Church Street
Suite 202
Kalamazoo, Michigan 49007
(616) 342-0288

APPENDIX

NOT FOR PUBLICATION*

85-1666

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EARL AGATE, et al.,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION, a Delaware Corp.,

Defendant-Appellee.

FILED
JUL 15 1986

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: KEITH and BOGGS, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

PER CURIAM: Plaintiff-Appellants Earl Agate, et al, appeal Judge Gibson's decision of July 18, 1985, from the United States District Court, Western District of Michigan, denying plaintiffs' motion to amend the pleadings pursuant to Fed. R. Civ. P. 59(e). Significantly,

plaintiff has not appealed Judge Gibson's June 18, 1985 opinion, which granted summary judgment in favor of defendant in plaintiffs' Section 301 suit alleging the union's unfair representation. Plaintiffs allege that the union unfairly represented them by not bringing a 1970 oral agreement, concerning lay-offs for employees in training (EIT's), to arbitration. We find no abuse of discretion, and affirm the decision below. The only issue which concerns us is whether the district judge abused his discretion in denying plaintiffs' motion to amend the pleadings so that plaintiffs could proceed to trial against General Motors alone.

Judge Gibson correctly noted that plaintiffs' complaint began a

four-step grievance procedure as provided by a collective bargaining agreement. In the instant case, plaintiffs' grievance went through the third step of the grievance procedure. The fourth and final step, arbitration, was requested, but not pursued by the union, because Paragraph 46 of the National Agreement only allows the umpire to consider written agreements. Thus, the oral agreement was not a proper subject for arbitration. This grievance procedure was to be the exclusive, final and binding means of settling disputes. This Court Fortune v. National Twist Drill & Tool Division, 684 F.2d 374 (6th Cir. 1982) held that an employee is bound by the finality provisions of a contractually established grievance

procedure, even though the procedure does not provide for arbitration. Accordingly, Judge Gibson was well within his discretion in denying plaintiffs' motion to amend.

AFFIRMED.

ISSUED AS MANDATE: August 6, 1986

COSTS: NONE

*NOT RECOMMENDED FOR FULL-TEXT PUBLICATION, Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be promiently displayed if this decision is reproduced.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARL AGATE, et al,

Plaintiffs,

vs. File No. K-324 CA

GENERAL MOTORS CORPORATION, et al.,

Opinion

Defendants.
_____/

This is a civil action filed by some 90 individuals who were employed at the General Motors Fisher Body Plant in Kalamazoo, Michigan from 1970 through 1978 and held positions in skilled trade classifications as a result of their participation in the Employee-In-Training Program. Defendants are General Motors Corporation (GM) and the International Union, United Automobile Aerospace and Agricultural

Implement Workers of America (International-UAW). Plaintiffs allege that GM breached an oral agreement governing layoffs of Employees-In-Training (EITs) and that the International-UAW breached its duty of fair representation in failing to timely advise them of that agreement and in failing to properly process their grievances. Now before the Court are motions for Summary Judgment filed by both defendants.

FACTUAL BACKGROUND

General Motors operates two training programs to satisfy its need for employees in the skilled trades. The Apprentice Program, designed to be the primary source of skilled employees, has stringent entry

requirements and includes a period of on-the-job and classroom training. Upon completion of the program, the employee is reclassified as a journeyman. The Employee-In-Training Program permits employees to obtain a journeyman classification in one of the skilled trades after serving a much longer period of on-the-job training than apprentices and without meeting the stringent entry requirements of the Apprentice Program. For all periods of time relevant to this action, the National Agreement between GM and the International-UAW specified formulas for determining the order of layoff and rehire among apprentices and similar formula for determining the order of layoff and rehire among EITs. However, even though

apprentices and EITs perform the same work, prior to the 1979 National Agreement, there was no formula for determining the order of layoff between apprentices and EITs working within the same skilled-trade classification.

At the time the 1970 National Agreement was being negotiated, the GM-UAW Skilled Trades Committee discussed a provision which would govern layoff and rehire of apprentices and EITs. While Plaintiffs contend, and the Internationa-UAW admits in its answer to paragraph 16 of the complaint, that an agreement was reached "regarding the order in which EIT's and apprentices were to be laid off," GM denies the existence of any binding agreement prior to 1979

citing the failure to include such an agreement in the 1970 national contract or the contracts negotiated in 1973 and 1976.

Plaintiffs claim that they first learned of this oral agreement in December of 1977. Some of the plaintiffs filed grievances challenging their layoffs claiming that the GM-UAW oral agreement required apprentices and EITs to be laid-off on the basis of their equity in their respective training programs. At least one grievance, that of David R. McClelland, was filed as early as January 13, 1978, charging management with "improper lay off" based on the 1970 oral agreement between GM and the UAW and demanding that McClelland be "made whole at once." All parties agree

that other grievances were filed on behalf of individual workers who claimed that GM had improperly laid them off based on the same oral agreement. However, while Plaintiffs claim that the grievances were consolidated at some point during the grievance procedure and thereafter were treated as a group or policy grievance, GM and the UAW adamantly dispute that claim. For purposes of the motions for summary judgment, except where otherwise indicated, the Court will treat the McClelland grievance as if it was a group grievance filed on behalf of all similarly situated plaintiffs.

The parties also dispute what conduct was covered by the grievances that were filed. Plaintiffs contend that the grievances covered all

layoffs they suffered from 1970 through 1978. Defendants argue that the grievances only covered layoffs occurring in 1978. For purposes of these summary judgment motions, except where otherwise indicated, the court will treat the individual and group grievances as if they covered all layoffs from 1970 through 1978.

Local Union No. 488-UAW, processed the grievance through the first two steps of the grievance procedure and, when the grievance was not adjusted at Step Two, filed an appeal to Step Three. Local 488 is not a party to this action.

Under the contract, the International Union became involved in the grievance at Step Three. The International Union, after reviewing the grievance pursuant to Section 38

of the 1976 National Agreement, concluded that the grievance was meritorious and authorized the appeal to Step Three. When the grievance was not adjusted at Step Three, it was submitted to an Impartial Umpire for binding arbitration under Step Four. However, because a representative of the International-UAW concluded that the National Agreement prohibits arbitration of oral agreements, the grievance was withdrawn from arbitration in June of 1981. This lawsuit was filed in July, 1981.

DISCUSSION

GM and the International-UAW have filed motions for summary judgment pursuant to Fed. R. Civ. P. 56 which provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

To warrant the grant of summary judgment, the moving party bears the burden of establishing the non-existence of any genuine issue of fact that is material to a judgment in his favor. Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 (1970); United States v. Articles of Device . . . Diapulse, 527 F.2D 1008, 1011 (6th Cir. 1976).

In determining whether or not there are issues of fact requiring a trial, "the inferences to be drawn from the underlying facts contained

in the affidavits, attached exhibits, and depositions must be viewed in light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425 (6th Cir. 1962). Even if the basic facts are not disputed summary judgment may be inappropriate when contradictory inferences may be drawn from them. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); E.E.O.C. v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 189, 427 F.2d 1091, 1093 (6th Cir. 1970).

Plaintiffs have alleged what is generally known as a hybrid Section 301/fair representation claim

charging GM with breaching the 1970 oral agreement and the International-UAW with breaching its duty of fair representation.

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on Section 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union . . . (employee-plaintiff) must not only show that their discharge was contrary to the contract, but must also carry the burden of demonstrating breach of the duty by the Union.'" DelCostello v. International Brotherhood of teamsters, 462 U.S. 151, 165-165, 103 S.Ct. 2290 (1983) (Citations and footnotes omitted).

In addition to numerous other arguments, defendants claim that they

are entitled to summary judgment because plaintiffs have failed to show a breach of the duty of fair representation by the International-UAW.

In their complaint, plaintiffs alleged that the union breached its duty of fair representation by: (1) fraudulently or negligently concealing the 1970 oral agreement from them and failing to enforce the agreement at the Kalamazoo Plant; (2) by failing to expeditiously process plaintiffs' grievances; and (3) by withdrawing the grievance from arbitration. Considering all of the evidence in a light most favorable to plaintiffs, the Court cannot conclude that the union's conduct with respect to the grievance procedure amounts to such "discriminatory, dishonest,

arbitrary or perfunctory" treatment of Plaintiffs' grievances that the union did not meet its duty of fair representation. DelCostello, 462 U.S. 164, 103 S.Ct. 2290.

Ordinarily, where a collective bargaining agreement provides a grievance procedure such as that contained in the national agreements in effect between GM and the International-UAW at all times relevant to this action, an employee will be required to exhaust the grievance procedure and will be bound by the determination reached in the grievance process according to the finality provisions of the collective bargaining agreement. DelCostello, 462 U.S. 163-164, 103 S.Ct. 2290. However, where the integrity of the of the grievance resolution mechanism

has been seriously undermined by union misconduct amounting to a breach of the union's duty of fair representation, an employee will not be required to exhaust the grievance process nor will he be bound by the contract's finality provisions. Id. Under this scheme, plaintiffs must show a breach of the duty of fair representation affecting the grievance process before they will be permitted to proceed with their claims against the employer in federal court.

Plaintiffs claim that the union's failure to advise them of the 1970 oral agreement breached the union's duty of fair representation. Although such a failure may constitute a breach of the duty of fair representation, see NLRB v.

Local 282, International Brotherhood of Teamsters, 740 F.2d 141 (2d Cir. 1984) (union's failure to notify membership of arbitration award affecting right to recall from layoff), it is only when the breach "seriously undermines the integrity" of the grievance process that the finality provisions of the collective bargaining agreement may be set aside. Hines v. Anchor Motor Freight, 424 U.S. 554, 567, 96 S.Ct. 1048, 1058 (1976). In this case, Plaintiffs have not shown that the union's failure to advise them of the 1970 oral agreement in any way "tainted" the grievance procedure.

While the union's failure to inform Plaintiffs of the 1970 oral agreement with GM may have resulted in a delay in plaintiffs filing

grievances with respect to their layoffs, plaintiffs have not identified how that delay made the subsequent grievance procedure unreliable. Nor have plaintiffs demonstrated that the union unduly delayed processing the grievances once they were filed. From the Court's review of the record in this case it is clear that the International-UAW did request an adjournment of the Third Step Appeal Meeting on the McClelland grievance. However, in the notices of the March 22, May 16 and July 26, 1978 appeal meetings, the minutes indicate that the McClelland case was held over by the International-UAW "to permit further investigation." The grievance was finally heard at the September 29, 1978, Third Step Appeal Meeting.

There is no evidence that the union's investigative delay adversely affected the determination of the merits of plaintiffs' case.

The record also shows that the case was appealed to Step Four of the grievance procedure on October 6, 1978, within the time limits provided by the National Agreement. Although final action on this grievance was not taken until it was withdrawn from arbitration in June of 1981, the depositions of union officials explained that part of this time would have been taken up by Step Four procedures which require an attempt to settle the grievance prior to submitting it to the umpire. Furthermore, those depositions indicated that in this particular case, some of the delay occasioned

during Step Four of the grievance procedure may be attributted to changes in union personnel assigned to the case because of illness and reassignment to other duties within the union.

All evidence in the record indicates that the International-UAW actively pursued plaintiffs' grievance through each step of the grievance procedure. Absent some evidence from plaintiffs that the delay in processing their grievance resulted from discriminatory or dishonest conduct by the union or perfunctory treatment of the grievance amounting to bad faith, the record does not permit the Court to conclude that the union breached its duty of fair representation as a result of the time it took to

complete the grievance process in this case.

The Court is also unable to conclude that the decision to withdraw the grievance from arbitration raises a factual issue requiring trial. Paragraph 46 of the National Agreement in effect at the time of this grievance prevented the Umpire from considering grievances based on oral agreements. Officials of the International-UAW testified to this interpretation of the National Agreement in their depositions and plaintiffs acknowledged and accepted this interpretation in answers to interrogatories. Even if the International-UAW erroneously concluded that the 1970 National Agreement prevented the umpire from ruling on grievances based on oral

agreements, such an error in judgment, without a showing that it was the result of arbitrary or perfunctory treatment of the grievance on the part of the union, is not a breach of the duty of fair representation. See, Hines v. Anchor Motor Freight, Inc., 424 U.S. at 571, 96 S.Ct. at 1059; Poole v. Budd Co., 706 F.2d 181 (6th Cir. 1983); but see Milstead v. International Brotherhood of Teamsters, 580 F.2d 232, 235 (6th Cir. 1978) (union's ignorance of contract provisions resulting in inept handling of grievance may be breach of duty of fair representation).

Because plaintiffs have failed to demonstrate that the union breached its duty of fair representation in such a way as to

call into question the validity of the determination reached during the grievance procedure, this Court may not relieve plaintiffs of the finality provisions of the collective bargaining agreement. Consequently, defendants are entitled to summary judgment on plaintiffs' hybrid Section 301/fair representation claim.

Plaintiffs fare no better if the McClelland grievance is not treated as a group grievance. In that case, they have either failed to exhaust the grievance procedure and failed to show that the union breached its duty of fair representation, or even assuming that those hurdles to bringing suit in this Court have been met, plaintiffs have failed to file suit on those claims within the

six-month statute of limitations. See DelCostello, 462 U.S. 151, 103 S.Ct. 2281; Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984). Similar disabilities would bar any claims for pre-1978 layoffs to extent that such claims were not covered by plaintiffs original grievances. Plaintiffs had the opportunity to use the grievance procedure to resolve their dispute over these issues. If that procedure was flawed by union misconduct, plaintiffs were required to file suit to obtain judicial review of their claims before the statute of limitations ran. The record indicates that all of the grievances at issue in this case were filed in 1978. This lawsuit was not filed until 1981. The statute of limitations has therefore barred any claims which were not

covered by the grievance procedure which terminated in June of 1981. This Court may not extend the statute of limiations because plaintiffs either misconceived the nature of their claims or the prerequisites to suit in this Court.

For similar reasons, even though the Court may have entertained an independent action against the union for its breach of the duty of fair representation in failing to advise plaintiffs of the 1970 oral agreement, see Mumford v. Glover, 503 F.2d 878 (5th Cir. 1974), any such action would be barred six months after plaintiff learned of the purported contract. The record shows that plaintiffs learned of the 1970 oral agreement no later than January of 1978. Again, since this action was

not filed until July of 1981, well after the statute of limitations had run on any claim plaintiffs may have had against the union for breach of its duty of fair representation unassociated with the contract claim against GM, such claims are time-barred.

Finally, in Count II of the complaint, plaintiffs allege that defendants fraudulently concealed the 1970 oral agreement from them so that they were denied the benefit of that agreement. Although the allegations in Count II arguably state a common-law tort claim under Michigan law, GM contends that any such claim is pre-empted by federal labor law. The Court must agree.

The conduct complained of by plaintiffs arises in the context of

the negotiation and interpretation of a collective bargaining agreement. In order to find in favor of plaintiffs on their tort claim, the Court would have to determine whether the parties did in fact reach an oral agreement in 1970 governing layoffs of apprentices and EITs. That determination is committed to resolution under federal law and any state law claim that depends on determining what terms the parties agreed to in a labor agreement is pre-empted by federal labor law. See Allis-Chalmers Corp. v. Lueck, U.S., 105 S.Ct. 1904 (1985).

CONCLUSION

For the foregoing reasons, the Court grants defendants motions for

summary judgment on all claims and this case is dismissed.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: June 18, 1985

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARL AGATE, et al.,

Plaintiffs,

v. File No. K81-324 CA

GENERAL MOTORS JUDGMENT
CORPORATION,
et al.,

Defendants.
_____/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 18th day of June, 1985.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated June 18, 1985, IT IS HEREBY ORDERED that defendants motions for summary judgment on all claims are granted and this case is dismissed.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARL AGATE, et al.,

Plaintiffs,

v. File No. K81-324 CA

GENERAL MOTORS CORPORATION, et al., OPINION

Defendants.
_____/

Plaintiffs filed this hybrid Section 301/fair representation action to recover damages for breach of an oral contract which they claim existed between General Motors Corporation (GM) and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). On June 18, 1986, this Court granted summary judgment to all defendants upon finding that

plaintiffs had failed to demonstrate a breach of the union's duty of fair representation which would justify setting aside the finality provisions of the contractual grievance procedure. Now before the Court is plaintiffs' motion to amend that judgment to permit them to proceed to trial against GM on their contract claim under Section 301 of the Labor Management Reporting Act, 29 U.S.C. Section 185.

Plaintiffs argue that they may recover from GM on their contract claim under the circumstances of this case even though they have failed to demonstrate that the union breached its duty of fair representation. In support of this argument, plaintiffs cite Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct.

267 (1962). Smith was a Section 301 breach of contract action which the trial court dismissed upon concluding that the dispute was within the exclusive jurisdiction of the National Labor Relations Board as an unfair labor practice. In that case, the Supreme Court held that a Section 301 action which involved conduct that was also an unfair labor practice was not preempted by the National Labor Relations Act (NLRA) and that individuals as well as unions could bring suit under Section 301 to vindicate contract rights. Id. 371 U.S. at 200-201, 83 S.Ct. at 270.

While the Smith case held that individual employees could bring Section 301 actions to enforce the collective bargaining agreement between the employer and its

unionized employees, the contract involved in Smith did not contain an exclusive grievance/arbitration procedure for resolution of contract disputes and there was no barrier to direct application to the courts for a decision on plaintiffs' contract claims. However, if the collective bargaining agreement contains an exclusive grievance procedure, then an employee must utilize that dispute resolution mechanism before he may file a Section 301 claim in federal court. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965). Furthermore, the employee will be bound according to the finality provisions of the grievance procedure unless he can demonstrate that the grievance process was tainted by union misconduct amounting

to a breach of the duty of fair representation. Hines v. Anchor Motor Freight, 424 U.S. 554, 567, 96 S.Ct. 1048, 1058 (1976). Absent union misconduct, the employee will be bound by the finality provisions of the contractually agreed upon grievance procedures even though those procedures do not provide for arbitration. Fortune v. National Twist Drill & Tool, 684 F.2d 374 (6th Cir. 1982) (citing Hayes v. Pipe & Foundry, 362 F.2d 414 (5th Cir. 1966)); accord Huffman v. Westinghouse Electric Corp., 752 F.2d 1221 (7th Cir. 1985).

In this case, the National Agreement between GM and the UAW contains a four-step grievance procedure. According to the contract, the decision at any step is final and

binding on all parties unless it is appealed to the next step. This grievance procedure is also the exclusive remedy for resolving disputes arising under the contract. Plaintiffs' grievance was processed through the third step of the grievance procedure and submitted to Step Four. It was subsequently withdrawn from Step Four because the union concluded that oral agreements could not be arbitrated. As a result, the decision at Step Three is final and binding on the parties. Absent evidence that the union breached its duty of fair representation, the bargained for finality provisions of the contract will not be set aside.

For the foregoing reasons, Plaintiffs are not entitled to an order amending the Court's June 18,

1984(sic), Judgment in favor of General Motors Corporation and their motion pursuant to Fed. R. Civ. P. 59 is denied.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: July 18, 1985

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARL AGATE, et al.,

Plaintiffs,

v. File No. K81-324 CA

GENERAL MOTORS CORPORATION, et al.,

JUDGMENT

Defendants.
_____/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 18th day of July, 1985.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the opinion date July 18, 1985, IT IS HEREBY ORDERED that plaintiffs are not entitled to an order amending the Court's June 18, 1984(sic) Judgment in favor of General Motors Corporation and their motion pursuant

to Fed. R. Civ. P. 59 is denied.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

* * * * * * * * * *

EARL AGATE, et al.,

Plaintiffs,

v. File No. K81-324 CA
Hon. Benjamin F. Gibson

GENERAL MOTORS CORPORATION, et al.,

Defendants.
_____/

James B. Ford P26997
Attorney for Plaintiffs
119 N. Church St., Suite 202
Kalamazoo, Michigan 49007
(616) 342-0288
_____/

* * * * * * * * * *

MOTION FOR AMENDMENT
OF JUDGMENT

NOW COMES Plaintiffs, by and through their respective attorneys and move the Court for an Order pursuant to FRCP 59 to amend the Judgment entered on June 18, 1985. Plaintiff's request that the Judgment

be amended to dismiss Defendant, United Auto Workers, only and that the case be ordered to trial against Defendant General Motors Corporation.

ZARBOCK & FORD
Attorney for Plaintiffs

By:_____

James B. Ford

Dated: June 26, 1985

BUSINESS ADDRESS:
119 N. Church Street
Suite 202
Kalamazoo, MI 49007
(616) 342-0288

GRIEVANCE PROCEDURE

Step One. Presentation of Grievance to Foreman

(28) Any employe* having a grievance, or one designated member of a group having a grievance, should first take the grievance up with the foreman who will attempt to adjust it.

(29) Any employe may request the foreman to call the committeeman for that district to handle a specified grievance with the foreman. The foreman will send for the committeeman without undue delay and without further discussion of the grievance.

(30) If the grievance is not adjusted by the foreman, it shall be reduced to writing on forms provided by the Corporation, and signed by the employe involved and one copy shall

be given to the foreman. The committeeman shall then take the grievance up with higher supervision with or without another committeeman, according to the agreed local practice.

Step Two. Appeal to Shop Committee

(31) If the case is not adjusted at this step, it may be referred to the Shop Committee (or sub-committee where established).

(32) In plants in which sub-committees are established, cases not adjusted by the sub-committee and the representative of Management may be appealed to the Shop Committee as a whole to be taken up with the highest Local Management.

(33) After a written grievance signed by the employe making the

complaint has been appealed to the Shop Committee by a committeeman, the Chairman of the Shop Committee may designate one of its members to make a further investigation of the grievance in order to discuss the grievance properly when it is taken up by the Shop Committee at a meeting with the Management. After a grievance has been discussed at the Shop Committee Meeting and before the submission of Notice of Unadjusted Grievance, the designated Shop Committeeman may reinvestigate the grievance in the light of any new facts disclosed in the Shop Committee Meeting or appearing in the Shop Committee Minutes.

(34) A final decision on appealed grievances will be given by a representative of the highest Local

Management within a maximum of fifteen working days from the date of first written filing thereof unless a different time limit is established by local agreement in writing. Any grievance not appealed from a decision at one step of this procedure in the plant to the next step within five working days of such decision, shall be considered settled on the basis of the last decision and not subject to further appeal. However, in plants where there are less than twenty-five hundred employes, the Shop Committee may, upon notifying the Plant Management in writing, substitute a ten (10) day period for the fifteen (15) day period and a three (3) day period for the five (5) day period. Provided further, however, that within the

applicable time limits of this Paragraph a grievance may be withdrawn by mutual agreement without prejudice to either party.

(35) Written answers will be given by the Management to all written grievances presented by the Shop Committee.

(36) The question of supplying minutes of the Shop Committee meetings with the Management to the Shop Committee and the form of such minutes is a matter to be negotiated with the Management of each plant by the Committee involved. In the interest of expediting orderly procedure, it is desirable for the Chairman of the Shop Committee to furnish Management with an agenda of the matters, including a listing of grievances the Union desires to

discuss at the meeting. The agenda if submitted should be furnished as far in advance of the meeting as possible. Such an agenda would not preclude discussion of other pertinent subjects. The minutes of Shop Committee meetings will be furnished to the Chairman of the Shop Committee within six (6) calendar days from the date of the meeting.

Such minutes should include:

(1) Date of meeting.

(2) Names of those present.

(3) Statement of each grievance taken up and discussed, also, in summary fashion, of the Union's contention or, at its option, a written contention, in the event of failure to adjust.

(4) Management's written answer on each grievance, with reason for

same if answer is adverse.

(5) "Highlights" of the meeting, these including specific questions asked by the Committee on policy matters and any answers to such questions given by Management.

(6) Date of approval, and signatures as agreed upon locally.

The above provisions shall not interfere with any mutually satisfactory local practice now in effect.

Step Three. Appeal to Corporation and International Union

(37) If the grievance is not adjusted at this step and the Shop Committee believes it has grounds for appeal from the Plant Management decision, the Chairman of the Shop Committee will give the Plant Management a written "Notice of

Unadjusted Grievance," on forms supplied by the Corporation, and the Chairman or designated member of the Shop Committee will then prepare a complete "Statement of Unadjusted Grievance" setting forth all facts and circumstances surrounding the grievance, signed by the Chairman of the Shop Committee. The Plant Manager or his designated representative will also prepare a complete "Statement of Unadjusted Grievance" and the Management's reason in support of the position taken, signed by the Plant Manager or his authorized representative. Three copies of the Union's statement will be exchanged with the management for three copies of the Management's statement as soon as possible and in any event within five (5) working days of the date of

filing the Notice of Unadjusted Grievance. The exchange of statements shall take place fifteen (15) working days after receipt of the Plant Management's decision, unless this time is extended by mutual agreement in writing, in which event the thirty days for appeal by the Regional Director as provided in Paragraph (38) shall be automatically extended by the same number of days as the amount of extended time for exchanging Statements of Unadjusted Grievance. Each Shop Committee shall consecutively number each "Statement of Unadjusted Grievance" from one upward for identification purposes.

(38) The Chairman of the Shop Committee shall then forward copies of the "Statements of Unadjusted Grievance," to the Regional Director

of the International Union. The Regional Director will review the case and determine if an appeal shall be made. The Regional Director or a specified representative and the Director of the General Motors Department of the International Union or a specified member of his staff will be granted permission to visit the plant for the purpose of investigating the specific grievance involved in "Statements of Unadjusted Grievance," providing such a grievance is of the nature that observation or investigation will aid in:

(1) Arriving at a decision as to whether or not a grievance exists:

(2) Arriving at a decision as to whether or not such grievance shall be appealed;

(3) The purpose of its proper presentation in the event of appeal.

Such visits will occur only after the following procedure has been complied with:

(a) The names of the individuals who will be permitted to enter the plant must be submitted in writing to Local Management previous to the date such entry is requested. Such names will be submitted to the Corporation by the General Motors Department of the International Union.

(b) The Regional Director shall give notice in writing to Plant Management of the request for entry and will identify the representative whom he wishes to make the visit and the specific grievance to be investigated. In the case of the Director of the General Motors

Department or a specified member of his staff, notice may be given either verbally or in writing.

(c) Plant Management will acknowledge receipt of the request and set a time during regular working hours which is mutually agreeable for such visit.

(d) A member of the Shop Committee or a district committeeman may accompany the Union representative during such visit should he request their presence. Management representatives may accompany the Union representatives during such visit.

(e) Only one such visit on a specified grievance shall be made by the Regional Director or his specified representative unless otherwise mutually agreed to.

(f) Such visits shall be restricted to the time mutually agreed upon in Point (c) above and shall be of reasonable duration and shall be subject to all plant rules and regulations which apoly to employes and all regulations made by the United States Army, Navy and Federal Bureau of Investigation.

It is mutually agreed that the purpose of this provision is solely to facilitate the operation of the grievance procedure, and that the Union representative shall confine his visit to its stated purpose. If it is necessary the Union representative may interview the employe or employes signing the grievance and employes in the bargaining unit who have information relevant to the case. Such interview

shall be a private interview when requested by the Union Representative and a suitable place will be provided.

Any dispute developing out of the application of these provisions may be finally determined by the Umpire.

If the Regional Director shall decide to appeal the case, he shall give notice on the form "Notice of Appeal" supplied by the Corporation, sending one copy each to the local Plan Management and the Chairman of the Shop Committee. Such "Notice of Appeal" will carry the same case number as the "Statement of Unadjusted Grievance." Except as provided in Paragraph (79e), any case not appealed within thirty days, or within thirty days plus any agreed

upon extension of time for exchanging Statements of Unadjusted Grievance as provided in Paragraph (37), after the date the written Statements of Unadjusted Grievance are exchanged, or, in any event, within forty-five (45) days of the date of the written decision of local Plant Management to the Shop Committee, shall be finally and automatically closed on the basis of written decision of the local Plant Management to the Shop Committee and shall not be subject to further appeal. The forty-five (45) day time limit for appeal shall be extended by the same number of days the local parties agree to extend the time limit for the exchange of Statements of Unadjusted Grievances. No case shall be reopened unless the Regional Director shall submit new

evidence to the Plant Management and it is mutually agreed by them that such case should be reopened. The case shall then date from the date it is reopened.

(39) The case will then be considered by an Appeal Committee consisting of four members as follows: For the Union, the Regional Director or one specified representative of the Regional Director who is permanently assigned to handle all cases arising under this Agreement, in all plants in his region, and the Chairman or another designated member of the Shop Committee of the plant involved; and two representatives of Local or Divisional Management, one of whom has not previously rendered a decision in the case. No person shall

act as a representative of a Regional Director in meetings of the Appeal Committee unless his name has been given to the Corporation in writing by the International Union. A representative of the International Office of the Union and/or a representative of the Personnel Staff of the Corporation may also attend such meetings at any time. Upon the written request of the Chairman of the Shop Committee and the Regional Director, or his specified representative, to the Plant Management, twenty-four (24) hours in advance of the meeting, a member of the Shop Committee (or the district comitteeman, in lieu of such Shop Committeeman, who has previously handled such case) will be permitted to participate in the appeal meeting

on such case) will be permitted to participate in the appeal meeting on such case. Whenever the Union requests the presence of a third representative at the appeal hearing, Management may also select a third representative who has previously handled the case, to participate in the appeal meeting on such case.

(40) Attendance of committeemen at the meetings of the Appeal Committee shall be considered as absence from the Plant under Paragraph (19) of the Agreement. Such committeemen will be paid their regular rate of pay for time spent in such meetings of the Appeal Committee for the hours that they would otherwise have worked in the plant.

(41) Meetings of the Appeal Committee shall be held not more

frequently than once each two weeks for each bargaining unit, unless mutually agreed otherwise. In event no meetings of the Appeal Committee have been held for more than two weeks, meetings will be arranged within seven days after "Notice of Appeal" has been received.

(42) If an adjustment of the case is not reached at this meeting, the Management will furnish a copy of its decision in writing and a copy of the minutes of the meeting, to the Chairman of the Shop Committee and the Regional Director within five working days after the meeting, unless this period is extended by mutual agreement in writing.

Step Four. Appeal to Impartial Umpire

(43) In the event of failure to

adjust the case at this point, it may be appealed to the impartial Umpire, providing it is the type of case on which the Umpire is authorized to rule. Notice of appeal of such cases to the Umpire by the Union shall be given by the Regional Director to the Plant Management of the plant in which the case arose, with copies of the Personnel Staff of the Corporation in Detroit and to the International Union Office at Detroit; in cases appealed to the Umpire by the Corporation, notice of such appeal will be given by the Corporation to the International Union Office in Detroit. Cases not appealed to the Umpire within twenty-one days from the date of a final decision given after review in an Appeal Committee meeting shall be

considered settled on the basis of the decisions so given; provided, however, that within the twenty-one (21) day time limit of this paragraph a case may be withdrawn by mutual agreement without prejudice to either party.

(43a) After a case has been appealed to the Umpire but prior to the Umpire hearing of the case, the Director of the General Motors Department of the International Union or a specified member of his staff will be granted permission to visit the plant for the purpose of investigating the specific grievance in accordance with all of the provisions of Paragraph (38) regarding plant visits.

(43b) (1) Any case appealed to the Third Step involving a continuing

refusal of Management to return an employe to work from sick leave of absence which has continued for twenty-six (26) weeks or longer, by reason of the medical findings of a physician or physicians acting for the Corporation, will be considered at the Third Step, if such findings are in conflict with the findings of the employe's personal physician with respect to whether the employe is able to do a job to which he is entitled in line with his seniority. Faling to resolve the question, the parties may by mutual agreement, refer the employe to a clinic or physician mutually agreed upon for a decision as to whether the employe is or is not able to do a job to which he is entitled in line with his seniority. If Management and the

Union are unable to agree within 15 days following Management's Third Step written decision on any aspect of the referral to a clinic or physician, the case will be reviewed upon the request of either party within 15 additional days in a meeting between representatives of the Personnel Staff of the Corporation and the GM Department of the International Union who will attempt to resolve it. Failing to resolve the matter, these parties may by mutual agreement refer the case to a clinic or physician mutually agreed upon for a decision as to whether the employe is or is not able to do a job to which he is entitled in line with his seniority. The expense of any mutually agreed to physical examination (s) in accordance with

the above provisions of this Paragraph (43b) shall be paid one half by the Corporation and one half by the Union.

(2) In the event the Corporation and the International Union are unable to mutually agree, within 15 days following the date of the Corporation-International Union review meeting, on the referral to a clinic or physician, the case shall be considered as automatically appealed to the Umpire and shall be scheduled for Umpire Hearing as expeditiously as practicable. The case will then be handled in accordance with Paragraph (45). Information furnished the Umpire shall include all relevant and material medical information that the parties themselves have jointly

considered. When deciding medical questions, the Umpire shall seek such competent medical advice, including specialists, as he may deem appropriate. Any examination of the employe by the medical personnel selected by the Umpire shall be conducted as close as feasible to the city in which the plant where the grievance arose is located.

(3) Any decision by a mutually agreed to medical authority at any step of this Paragraph (43b) procedure, or by the Umpire, shall be final and binding on the Union, the employe involved and the Corporation. Any retroactive pay due the employe shall be limited to a period commencing with the date of filing the grievance, or the date the employe became able to do a job to

which he is entitled in line with his seniority, whichever is the later. The Umpire shall have full discretion to set the amount of back pay, if any, when a dispute exists as to the back pay to which an employe may be entitled for any period during the processing of the grievance when the employe refuses to cooperate with diagnostic medical procedures at other than his own expense.

(44) The impartial Umpire shall have only the functions set forth herein and shall serve during the term of his contract for as long as he continues to be acceptable to both parties. The fees and expenses of the Umpire will be paid one-half by the Corporation and one-half by the Union and all other expenses shall be borne by the party incurring them.

(45) All cases shall be presented to the Umpire in the form of a written brief prepared by each party, setting forth the facts and its position and the arguments in support thereof. The Umpire may make such investigation as he may deem proper and may at his option hold a hearing open to the parties and examine the witnesses of each party and each party shall have the right to cross-examine all such witnesses and to make a record of all such proceedings.

*as appeared in original text

29 USC 1291 Final Decisions of district courts

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to

the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

29 U.S.C. Section 173:

FUNCTIONS OF SERVICE

Use of conciliation and mediation services as last resort

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 USC Section 185

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of

its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized

officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute serice upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title Section 301, 61 Stat. 156.